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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-272

STATE OF GEORGIA, *et al.*,

Petitioners,

v.

THE NATIONAL DEMOCRATIC PARTY,
THE NATIONAL REPUBLICAN PARTY,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, the State of Georgia, Lester G. Maddox, individually and as (former) Governor of the State of Georgia (now Lieutenant Governor), the State Election Board of Georgia, Ben W. Fortson, Jr., individually and as Secretary of State of the State of Georgia and as Chairman of the State Election Board, Mrs. Harry B. Williams, W. F. Blanks and John W. Greer, individually and as members (and former members) of the State

Election Board, and Ralph A. Dougherty and Harold N. Hill, individually, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 23, 1971.

Petitioners name as respondents the National Democratic Party, the Democratic National Committee, Channing E. Phillips and Miss Flaxie Pinkett, individually and as District of Columbia members of the Democratic National Committee, the National Republican Party, the Republican National Committee, and Carl L. Shipley and Mrs. J. Willard Marriott, individually and as District of Columbia members of the Republican National Committee.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court, not yet reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 23, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the Democratic and Republican Parties weight the votes of citizens in favored States, and dilute the votes of citizens in disfavored States, in nominating the President of the United States?

2. May the Democratic and Republican Parties nominate the President in malapportioned national conventions, or should such conventions be reapportioned pursuant to the 14th Amendment on the basis of one man-one vote?

3. Was the court below correct in holding that one man-one vote is not the proper apportionment formula to be utilized by respondents in nominating the President of the United States?

4. Where a Court of Appeals finds state action in a non-political, justiciable question, may the appellate court deny declaratory and injunctive relief because of the emphasis appellants placed on the errors of the District Court rather than on the form of relief (App. 18)?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Section 2, particularly:

> "But when the right to vote at any election for the choice of electors for President and Vice President of the United States . . . is . . . in any way abridged, except for participation in rebellion, or

other crime, the basis of representation therein [in the House of Representatives] shall be reduced . . . ."

STATEMENT OF THE CASE

This is a voting rights case, brought on behalf of voters whose vote in presidential elections is being diluted and debased by the malapportioned national nominating conventions conducted by respondents. The suit, invoking the jurisdiction of the District Court on the above stated basis (28 U.S.C. §§ 1343(3), 1343(4), 2201, and 42 U.S.C. §§ 1983, 1985(2), 1985(3) and 1988), sought a declaratory judgment that respondents' national conventions are malapportioned and violate plaintiffs' constitutional and civil rights. Complainants also sought injunctive relief.

The use of nominating conventions to choose candidates for the presidency began in 1832 in the Democratic Party. The Republican Party met in its first national convention in 1856.

There exists today, with respect to presidential elections, a two party system, which system has existed since at least 1868. The two political parties are respondents in this action. Every four years the respondents meet in convention to elect nominees for the offices of President and Vice President.

No person not a nominee of one or the other of these two political parties has been elected President or Vice President in the last 100 years.

Nomination of one's candidates at one of respondents' national conventions is the only means available to succeed in electing such candidates to office. Failure to

become the nominee for the office of President or Vice President of one or the other of the two political parties is equivalent to defeat.

Voters throughout the United States are effectively limited in their choice of President and Vice President to the nominees of one or the other of these two political parties. The national conventions are an integral part of the presidential election process.

The nominees of the two political parties are chosen in malapportioned national conventions. The apportionment formulas of both political parties for their 1968 conventions are reproduced in the appendix (App. 19, 20). Suffice it to say that both political parties awarded "victory bonus" votes to States which favored the party's presidential candidate, and "popular bonus" votes based on the number of votes cast for the party's candidate, in the preceding presidential election.

At the 1968 Democratic Convention, the citizens of 29 States were overrepresented, and those of 20 were underrepresented. Only Arizona was neither over nor underrepresented.

At the 1968 Republican Convention, the citizens of 34 States were overrepresented, and those of 15 were underrepresented. Only West Virginia was neither over nor underrepresented.

However, by and large it was the citizens of those States who were overrepresented in the Democratic Convention who were also overrepresented in the Republican Convention. Similarly, the citizens underrepresented in the Democratic Convention found themselves underrepresented in the Republican Convention. (Appellants will be underrepresented in both conventions in 1972.)

Twenty-eight States were overrepresented at both 1968 national conventions (Alaska, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming). Fourteen States were underrepresented at both 1968 national conventions (California, Florida, Illinois, Indiana, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas and Virginia).

The ratio of most overrepresented State to least represented was in excess of to 9 to 1 in both conventions. The people in the State of Alaska were overrepresented in both national conventions held in 1968 by a variance of approximately 85% (Demo.—84.97%; Repub.—85.99%).

Delegates representing about 38% of the people had a majority and controlled the nomination of candidates in *both* conventions (Demo.—38.27%; Repub.—37.39%).

Of the 28 States which were overrepresented at both 1968 national conventions, 19 were west of the Mississippi River. Of the 14 States which were underrepresented at both National Conventions in 1968, 12 were east of the Mississippi.

The respondents' apportionment formulas which produced this disproportionate "State-unit" system favoring the western States were found by the District Court to be "responsive and reasonable under the prevailing cir-

cumstances", and "non-justiciable" (App. 1-2). That court denied petitioners' prayers for injunction as well as for summary, declaratory, judgment (App. 2).

The Court of Appeals found "state action", noting that it is as if the States themselves were collectively conducting the nominating conventions (App. 11). The court found a non-political, justiciable question (App. 12-15). Yet the court did not declare whether or not respondents' national conventions are malapportioned, and did not determine whether respondents' apportionment schemes are fair and reasonable. Instead, the court held that one man-one vote is not the appropriate standard for respondents (App. 16-18) and affirmed the judgment of the District Court, denying all relief, including declaratory relief, to appellants (App. 19).

We respectfully submit that having found state action (just as if the States collectively conducted the conventions), and having found a non-political, justiciable question, then "one man-one vote" follows as the day follows night. We submit that the respondents are not entitled to special treatment under the Constitution, not accorded to the States themselves. And we most respectfully submit that if there is to be any limitation on "one man-one vote," it can only be valid and effective nationwide, as to Democrats and Republicans, if announced by this Court.

REASONS FOR GRANTING THE WRIT

As of now, every voter in the United States is either underrepresented or overrepresented in one or both of the national conventions which predetermine the voters'

choice of President. Many voters are overrepresented in both conventions, many are underrepresented in both. Georgians are among those that will be underrepresented at both 1972 conventions.

The decision in this case, even denial of this petition, will affect every voter in the United States. The decision will either permit the continuation of massive vote dilution in presidental elections, or it will make the political parties responsive to the people, rather than making the people respond to the candidates chosen by the political parties.

The presidential candidates will be affected by this decision. They will either continue to campaign among the trees and pastures or they will go to where the people are.

This Court, in its reapportionment decisions and its voting rights cases, has applied the one man-one vote principle consistently, from the lowest level of elective public office. The courts below refused to apply this Court's decisions to the highest, most important office—the presidency.

The District Court for the District of Columbia, a court singled out to decide voting rights cases (Voting Rights Act of 1965, Pub.L. 89-110, Aug. 6, 1965, 79 Stat. 439, 42 U.S.C.A. § 1973c), cited only one decision of this Court. That was *Powell v. McCormack,* 395 U.S. 486 (1969).

Citing *Powell,* the District Court said (App. 2):

> "This Court finds that the claim in this action does not admit to judicial relief as there are no 'judicially

discoverable and manageable standards' by which to frame appropriate relief."

We in Georgia, personally familiar with the landmarks of *Gray v. Sanders,* 372 U.S. 368, and *Wesberry v. Sanders,* 376 U.S. 1, and well acquainted with *Baker v. Carr,* 369 U.S. 186, and *Reynolds v. Sims,* 377 U.S. 533, have found one man-one vote to be discoverable, judicially, and manageable. We were surprised that the courts below did not manage those decisions, or the remainder of *Powell v. McCormack,* which went on to hold that where declaratory judgment is sought (as it was in the instant case), it should be granted even if coercive (injunctive) relief were found to be inappropriate.[1] As in *Powell,* the petitioners here sought a declaratory judgment, a form of relief the courts below could and should have issued. *Powell v. McCormack, supra* at 517.

In *Powell,* this Court relied upon the first of its re-

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[1]The District Court for the Western District of Washington, in *Maxey v. Washington State Democratic Committee,* 319 F. Supp. 673 (W.D. Wash. 1970), *appeal pending* (No. 71-1051, 9th Cir.), a case preserved by this Court's decision in *Dahl v. Republican State Committee,* 393 U.S. 408 (1969), held that *state* conventions were subject to those decisions of this Court, and that the proper apportionment formula was either "one Democrat-one vote" or "one man-one vote".

The District Court for the District of Columbia, in *Bode et al. v. National Democratic Party et al.* (D.C. No. 540-71), *appeal pending* (No. 71-1536, D.C. Cir.), held on June 22, 1971 that *national* conventions were subject to the decisions of this Court, held that the apportionment of delegates to those conventions is justiciable, held the 1972 Democratic delegate apportionment formula to be invalid, but ordered reapportionment on the basis of "one Democrat-one vote", not "one man-one vote". The Republicans are not parties to that suit.

apportionment decisions, *Baker v. Carr*, 369 U.S. 186 (1962), saying (*Powell v. McCormack, supra* at 517):

> "In deciding generally whether a claim is justiciable, a court must determine whether 'the *duty* asserted can be judicially *identified* and its *breach* judicially *determined*, and whether *protection* for the right asserted can be judicially *molded*.' *Baker v. Carr, supra*, at 198." (Italics added.)

As for the case at bar, the duty asserted has been judicially identified—one man-one vote. The breach has been judicially determined—malapportionment violates the equal protection clause. And the remedy has been judicially molded—reapportionment on the basis of one man-one vote.

The District Court nevertheless denied even declaratory relief, and the Court of Appeals affirmed.

This suit was filed on March 25, 1970, in ample time to have it decided before the 1972 presidential election process begins.

Petitioners expedited the proceedings (filing interrogatories and requests for admissions, so as to avoid issues of fact, while respondents postponed answering), and secured a hearing in the District Court on November 6, 1970.

The District Court issued its decision on November 24, 1970 (App. 1-2). Petitioners promptly filed their notice of appeal, docketed the case in the Court of Appeals on January 7, 1971, and moved that it be advanced for oral argument because of the importance of the issues raised and the need for expedition.

On February 19, 1971, respondent Democratic National Committee adopted its 1972 apportionment formula, and it was considered by the Court of Appeals. (The apportionment formulas of the Democrats and Republicans for use at their 1972 conventions are reproduced in the appendix, App. 22, 24.)

The Court of Appeals granted petitioners' motion for expedition, and oral argument was heard on April 9, 1971. Its decision was rendered on July 23, 1971 (App. 3). Summer and its judicial recesses are now here.

The 1972 presidential election process will commence on or about January 7, 1972, with the opening of qualifying for presidential candidates, and for candidates seeking election as delegates to the 1972 national conventions, in the New Hampshire Presidential Primary to be held on March 14, 1972.

Under the present Democratic apportionment formula, New Hampshire will have 18 delegates at the 1972 Democratic Convention. According to its population, New Hampshire is entitled to only 11 votes at that convention. It will be overrepresented by 7 votes, or 63.33%.

If New Hampshire opens qualifying for 18 delegates on January 7, 1972, and then has to cut its delegation to 11, before or after its March Presidential Primary, 7 delegates and many New Hampshire voters, not to mention the presidential candidates, will be directly affected. The same is true of other States holding such primaries; e.g. Massachusetts (delegate qualifying closes February 16, 1972 for the April 25 primary), Ohio (delegate qualifying closes March 1 for the May 1 primary), Wisconsin (delegate qualifiying closes March 14, 1972

for the April 4 primary), Nebraska (delegate qualifying closes March 10, 1972 for the May 9 primary), Florida, Oregon, New Jersey, *et al.*[1]

Under the present Democratic apportionment formula, Massachusetts will be overrepresented by 18 votes, Ohio is underrepresented by 5 votes, Wisconsin is over by 1 vote, Nebraska is over by 2 votes, Florida is under by 20 votes, Oregon is over by 3 votes, and New Jersey is over by 3 votes. (Georgians will be underrepresented at the 1972 Democratic Convention by 15 votes.)

Those delegations having to increase their number in either the Democratic or Republican Convention may experience more difficulty than those having to cut.

However, there is no need for doubt as to the number of delegates (votes) the citizens of each State shall have at the '72 conventions, if certiorari is granted.

The Court of Appeals for the District of Columbia held that a delegate to a national convention represents only those citizens of his State who share his political persuasion (App. 17). We submit that under the present system, the citizens of his State are forced to adopt his political persuasion, or that of his counterpart in the other convention. The court below stated that a delegate may vote for a candidate whose views are diametrically opposed to the political persuasion of large segments of the population of his State (App. 17). We readily admit that this is historically true, but it is this view of the delegate's role in selecting the President which appellants seek to have reviewed. Should the

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[1]In 1968, fourteen states held presidential primaries. The number is expected to increase in 1972.

delegates be responsive to all citizens, rather than to a few? And if the proper standard is "one Democrat-one vote" and the definition of a Democrat is "one who voted for the Democratic nominee in a past election or elections", what voice in the selection of the President in 1972 will the 25 million people have, who have attained voting age and rights since the last presidential election (U.S. News and World Report, June 14, 1971, p. 38; see *Oregon v. Mitchell*, 400 U.S. 112)? We earnestly submit that these issues warrant resolution by this Court.

Petitioners thus seek the expeditious grant of certiorari so as not to disrupt the 1972 presidential election process, by allowing time for consideration and rendition of a proper and final decision in this case affecting all voters and both political parties.

CONCLUSION

We respectfully submit that the issues in this case are of such imperative public importance as to necessitate prompt settlement in this Court and that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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